THE CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS WITHIN THE EUROPEAN LEGAL AREA

Alina Angela Manolescu
Assist.Candidate to Ph.D. „S. Pio V" University of Rome
a.a.manolescu@gmail.com
Professor Ph.D. **Adriana Manolescu**
AGORA University
Law and Economics Faculty
adrianamanolescu@gmail.com

Abstract : *This article analyses the concept of corporate social responsibility and the role of profit-oriented businesses in the European legal area. The subject is viewed in the optic of the regional initiative of respecting human rights standards in European Union. The European legal area is a dynamic institutional frame that consents a constant institutional evolution using different juridical instruments. In this area we examine the European Union's approach to corporate social responsibility. This approach is at a crucial stage of development, given the globalized operations and the transnational dimension of European corporations. The main conclusion is that the regional approach of European Union represents a positive towards the regulation of corporate entities, but a more oriented approach on the role of Courts and the derivate law is preferred.*

Key words: *transnational, corporations, responsibility, globalization, European law*

The European legal area indicates the union of juridical orders determined with the constitution of European Union in 1992. This particular „order of orders" is composed by the juridical order of the European Communities, integrated by the politics and the forms of cooperation instituted by the European Union Treaty and by the juridical orders of the Member states. The subjects of the Unions` order are the States, the European people and the Member States citizens that have not only the national citizenship but also the European one. (art. 17, c. 1, TCE).

The European legal area is one of the main juridical connotation of the EU and it represents the constitutional innovations of the Treaty of Maastricht. In this occasion it was establish the principle of coexistence of European Communities and the Member States and the intergovernmental cooperation, with flexible procedures.

Recent economic globalization and trade liberalization have given multinational enterprises considerable economic power that often surpasses that of states. While states are subject to various international and internal mechanisms designed to prevent them from abusing their powers, multinational enterprises are traditionally bound by national laws of limited geographical scope. In the global market, where legislation tends to vary considerably from one country to another, little exists in terms of universal standards applicable to multinational corporations.

In this framework of globalization the law acquires a "transnational language"[1] that refers to all the legislation of the transnational relations. It is important to note that transnational doesn't mean international. The international dimension is that of states, while the transnational space is that of mobile subjects, such as transnational corporations, that are continuously present within this dimension.

In Europe there are more than 100 multinational corporations and the most efficient international human rights mechanism in the world - the European Court of Human Rights - found in 2000 over 400 violations of the European Convention on Human Rights, legally binding upon its signatories. The scope of this mechanism is, however, limited to violations committed by state actors. Victims of violations committed by private entities such as multinational enterprises cannot seek remedy before the court unless some kind of state involvement is implicated.

[1] M. R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Il Mulino Saggi, 2002

Economic globalization and the rise of transnational corporate power have created a favourable climate for corporate human rights abusers, which are governed principally by the codes of supply and demand and show genuine loyalty only to their stockholders.
As globalization has increased in the past decade or two, so has the criticisms. Whether it is concerns at profits over people as the driving factor, or violations of human rights, or large scale tax avoidance by some companies, some large multinationals operating in developing countries in particular have certainly had many questions to answer.

The European Union is a unique forum within which to evaluate the corporate social responsibility because it unites the large European economy with Europe's commitment to human rights and social values. Although the initial goal of European integration was to create a common market, the European Court of Justice stressed that respect for human rights forms an integral part of the general principles of Community law. As a result, the EU does not see the creation of common markets and enhanced protection of human rights as mutually exclusive. Rather, the EU believes that one cannot be achieved without the other. "Economic freedoms are not absolute, but must be viewed in relation to their social function and with due regard for human rights. Economic efficiency must be pursued together with democratic legitimacy and social justice."[2] The EU is therefore not only concerned with the promotion of human rights by their inclusion in the creation of common markets but also with the added value human rights provide to economic and social welfare. Even if the EU dimension is well-defined, we can find here a transnational spirit that surpasses the states.

Another issue is that of human rights that cannot by collocated in a territorial juridical framework, such as one of states. Human rights have the characteristic of a de-territorialisation, with the objective to become universal, or at least regional. Transnational corporations have an enormous economic power supplied by the capacity of de-territorialisation. They are transnational subjects with a great capacity of mobility and they have the power to condition even the states. In recent years there has been increasing concern about the behaviour of corporate entities in relation to human rights. As a consequence, corporations are encountering greater scrutiny of their activities on a global level and the idea of encouraging or even requiring companies to adhere to minimum standards of behaviour has become enshrined within a concept known as corporate social responsibility.

The protection of human rights is not traditionally considered a responsibility of corporations. The domestic laws of many states fail to impose adequate human rights duties on corporations, while it is unlikely that there are any direct duties imposed by international law. Yet corporations, especially multinational corporations, are very powerful entities in the current world order. Their impact on the wellbeing of communities and individuals, including in terms of human rights, is evident wherever they operate. While there is considerable scope for that impact to be positive, corporate activity is often perceived to have a detrimental impact on human rights protection.

The transnational corporations are economic and non juridical subjects that have a continuous need of juridical assistance in order to achieve their goal of profit. The law has the central role in the enterprises' strategies and the corporations delegate the juridical task to the experts of corporate law.

Many corporations, like states, have the resources and power both to perpetrate and to escape responsibility for abuse. The subject is one that benefits from a huge and expanding literature, including scholarly legal writing, governmental and intergovernmental outputs, as well as the work of campaigning groups such as Amnesty International and Human Rights Watch.

Multinational corporations are accused both of direct human rights abuses and of colluding in various ways with repressive states. Because of the normative implications of this task many writers have drawn on complicity, a notion widely recognized in systems of criminal law. It is not

[2] Pall A. Davidsson., *Legal enforcement of corporate social responsibility within the EU*, LL.M. Columbia University School of Law, 2002

so much the marriage of criminal law principles and international law but the adoption of the corporation as a fully accepted member of the 'legally responsible' family that presents the greatest obstacle here. National jurisdictions are either reluctant to or encounter difficulty in applying criminal sanctions to corporations.

Some authors[3] point out the complex plurality of actors involved in business regulation, the power of the nation state, the growth of international organizations and the importance of epistemic communities.

Corporations owe their status in law to law. From this it follows that they should be challengeable in law, through revocation of their status, through claims for false advertising or actions against individual directors. So new legal principles of attributing actions to the corporate entity are necessary, together with rules reflecting the reality of state and corporate structures of decision-making.

Considering the theory of the three generations of human rights, the responsibilities in the context of first-generation human rights are an integral part of the dimension of good management practices. Although one could find evidence that illegitimate practices have a positive impact on doing business in a country with deficits in good governance, companies competing with integrity will not put first generation rights in the negotiation basket with economic goods. On the contrary, as far as these rights are concerned, a company must do all in its power to ensure that there are no violations within its own sphere of influence and that it also does not benefit from human rights abuses by other parties. This implies the obligation to strive for all relevant knowledge in this respect as far as is reasonably possible. As far as second-generation human rights are concerned, the normal business operations of a company form the main corporate contribution to the preservation of these rights: it is the basic social function of companies to produce products and services in a legal way and to sell these on the market. To this end, they hire employees of an adult age who work of their own volition in exchange for pay as defined in legally binding contracts or collective bargaining agreements. In addition, companies pay contributions into the social security system. In this way, they enable their employees to secure their own economic human rights. Companies purchase goods and services, pay market prices for them, and thereby engender economic linkage effects. Last but not least, companies make a financial contribution towards the community through taxes and duty. This enables the state to fulfil its tasks.[4]

The European Union has been relatively slow to embrace the concept of corporate social responsibility, despite the long European tradition of "socially responsible initiatives by entrepreneurs."[5]

The Green Paper[6] is part of a wider framework of a Commission proposal on a European strategy on sustainable development, which was endorsed by the conclusions of the Gothenburg European Council in June 2001. According to this strategy, long-term economic growth, social cohesion and environmental protection must "go hand in hand".

The Gothenburg Summit in June 2001 specifically considered the role of companies within society and within the context of a "sustainable development strategy" for Europe. The stated aim of this initiative was to stimulate debate about corporate social responsibility within the European context rather than "making concrete proposals for action." In other words, actors selected a clear "soft law" approach. The Green Paper asks several key questions including: (1) What is the role of the E.U. in the development of corporate social responsibility?(2) What is the role of corporate social responsibility in corporate business strategies? (3) What is the role of other stakeholders? (4)

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[3] J. Braithwaite, P. Drahos, *Global Business Regulation*, 2000

[4] http://www.unglobalcompact.org/docs/Klaus M. Leisinger

[5] Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 5, COM (2002) 347 final (July 2, 2002)

[6] European Commission, *Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 3, COM (2001) 366 final (July 18, 2001), available at http://europa.eu. int /comm/employment_social /soc-dial /csr/greenpaper_en.pdf

How should corporate social responsibility strategies be monitored and evaluated? (5) What mechanisms are most appropriate for developing corporate social responsibility, and at what level?
In the Green Paper, the Commission states that there has recently been much attention given to the way in which companies deal with and interact with their employees when managing large-scale redundancies. The Commission therefore stresses that responsible "downsizing" must include the involvement and participation of those workers affected, by means of information and consultation, the safeguarding of employees' rights and vocational retraining where necessary.

The Green Paper argues that corporate social responsibility also means the relationship between companies and their environments, at local, national, European and worldwide level. It states that good relations with local settings are important for companies as this is where they recruit the majority of their staff. It is also important for companies to develop networks and create links to other businesses.[7]

While there is a strong tradition of corporate social responsibility at local level by small and medium-sized enterprises, corporate social responsibility has a growing international dimension due to the increasingly global nature of company supply chains. The Paper notes that a growing number of firms are adopting codes of conduct covering a variety of social issues such as working conditions, human rights and environmental aspects. However, the Commission makes it clear that these codes should serve to complement, rather than replace, national and international laws. It adds that their effectiveness depends on proper implementation.

The Green Paper notes that successful corporate social responsibility means including it fully in the culture of the business and being seen to do so. It states further that although many multinational companies already publish reports on corporate social responsibility, "less attention is paid to areas such as human resource management, information and consultation, child labour and human rights." The Commission therefore states that there should be greater consensus on the type of information disclosed and more comprehensive coverage in social accounting, reporting and auditing.

The Commission goes on to say that "socially responsible investing" (SRI), under which funds are directed towards companies which comply with specific social criteria, has been gaining in popularity. However, it adds that in order to prove more useful and to provide potential investors with a clear picture, greater harmonization of evaluation tools for SRI is needed.

There were 261 responses to the Green Paper[8], with only nine out of fifteen Member States responding (Belgium, Germany, Finland, France, Ireland, Netherlands, Austria, Sweden, U.K.).

Unfortunately, the Green Paper constricts the debate by relying on a very limited, and business-oriented, definition of corporate social responsibility, describing it as a “concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”[9]

In the responses to the E.U.’s Green Paper, there is a remarkable homogeneity between individual corporate responses and the responses of industry representatives. The responses emphasize self-regulation, while demonstrating a lack of enthusiasm for enforcement mechanisms, temporization of implementation requirements, the voluntary nature of corporate social responsibility, and good practice. The responses also displayed a general abhorrence of a “one-size fits all” approach to corporate social responsibility. Published in July 2002, the European Commission’s response to the Green Paper is both disappointing and heartening in equal respects. Entitled the “Communication from the Commission concerning Corporate Social Responsibility: a business contribution to Sustainable Development,” it clearly adheres to the business case.

This Green Paper can be seen as an important step in stimulating debate in an area where there has been a significant amount of interest and corporate activity in recent years. Corporate social responsibility is potentially a very broad area, encompassing both how companies treat their

[7] Cfr. Pall A. Davidsson.
[8] See European Commission, Responses to the Consultation on the Green Paper on corporate social responsibility, http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm
[9] Cfr. Supra notes

own staff and suppliers – in terms of both stable employment situations and restructuring programs – and how companies interact with their environment, both in relation to the physical environment and the treatment of people in their surrounding location.

In an increasingly globalized world, more businesses are operating transnational "in a way that exceeds the regulatory capacities of any one national system."[10] While a regional approach is one way to achieve compliance with corporate social responsibility norms, an international tactic would be a superior choice.

Some authors[11] consider that a new type of law is emerging, the one based on *lex mercatoria* that is alimented by the law conflict of different states. This occurs because these corporations and even some nations seek out places where poor labour regulations can be taken advantage of in an unfair way, or by not supporting—or even opposing—international or national bodies and policies that could help to ensure fairness. The multinational organizations search for the "normative gap" so in a transnational dimension we can say that corporations main rule is the lex mercatoria, which gives them a measure of variable territoriality putting the States in a minority condition.

The gaps in legislation facilitate the unlawful conduct of some of the multinational corporations, while the response of states continues to be silence and inaction. In this transnational scenario the institutional role of the multinational corporations acquires an even more relevant characteristic. In the globalized society they contribute to the determination of life-stiles, conditions and even new identities.

It is important to note that global law doesn't have to be identified with a procedure, but with a process[12] so the only way of issuing the problem of corporate responsibility is that of strengthening the importance of courts rather than that of the written legislation. The international community should insist on robust enforcement by states of their duty to respect, protect and fulfil human rights norms through the regulation of private actors. However, this needs to go beyond merely providing for "after the fact" judicial determinations of liability once violations have already occurred. The boundaries of current doctrine determining when the actions of transnational corporations can be treated as state action and when states can be held complicit in corporate abuses should also be further explored.

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